

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP1421

Cir. Ct. No. 2012CF6164

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY J. JAMES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Courtney J. James, *pro se*, appeals from the circuit court order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2015-16).¹ James argues that the attorneys who represented him at trial rendered ineffective assistance of counsel for a number of reasons, and that appellate counsel was ineffective in his direct appeal for failing to raise these claims. We affirm.

BACKGROUND

¶2 James was convicted of first-degree recklessly endangering safety as a party to a crime, and first-degree reckless homicide as a party to a crime, both while using a dangerous weapon. These charges stemmed from two shooting incidents that occurred on February 3, 2012. The first shooting occurred when James allegedly shot into the home of a woman, S.P., who had gotten into a verbal altercation earlier that day with James's brother, Erosa James. S.P.'s brother, Artaze Williams, then engaged in a physical fight with Erosa outside of a store located on Burleigh Avenue in Milwaukee.

¶3 James is shown on hospital surveillance video arriving at the hospital shortly after that altercation was reported to have taken place, getting out of the driver's side of a Buick LeSabre and getting hospital staff to assist Erosa out of the car. Approximately one hour after that surveillance video was taken, shots were fired into S.P.'s house. An eye-witness stated that he saw the shooter driving a brown sport utility vehicle away from the scene.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Later that afternoon, James was again caught on hospital surveillance video, this time driving a burgundy Jeep; he parked the Jeep on the street instead of using the parking lot of the hospital. James's mother had arrived at the hospital a half hour before, driving the Buick LeSabre that James had driven to the hospital earlier. James, Erosa, and their mother were then seen leaving the hospital; their mother got into the Buick LeSabre, while James and Erosa walked in the direction where the burgundy Jeep had been parked.

¶5 The second shooting occurred approximately an hour after the James family left the hospital. Police responded to a report of a homicide, and found Williams shot in the driver's side of his vehicle. There had been a passenger in Williams's vehicle, Coria Stotts, who said that prior to the shooting, Williams had told her that he had been in an altercation earlier that day with "a dude that robbed my sister." Stotts later identified the shooter as Erosa.

¶6 Additionally, Maurice Smith witnessed Williams's shooting from inside a residence across the street. He stated that he had seen a dark-colored sports utility vehicle parked in front of the residence which matched the general description of the burgundy Jeep. Smith saw a black man outside of the vehicle who looked like he was attempting to watch someone without being seen. Smith saw a second black man in the driver's seat of the vehicle, and at one point saw the two men speaking. A short time later, Smith saw a black man, who he believes was the man outside the vehicle, shoot Williams; Smith then backed away from the window so he did not see how the shooter left the scene.

¶7 The burgundy Jeep was recovered at James's mother's residence three days after the shootings. Upon searching the Jeep, the police recovered an unfired 9mm cartridge that matched the spent shell casings found at the scene of

Williams's murder. They also found a receipt for a bill relating to the phone number of James's cell phone.

¶8 A jury convicted James of these charges in December 2013. He was sentenced to a total of twenty-one years of initial confinement and ten years of extended supervision.

¶9 James took a direct appeal of his conviction, making a *Batson*² challenge with regard to the State's peremptory strike of Juror 14, an African-American male. This court rejected James's claim, finding that the trial court's³ conclusion—that the State's strike of Juror 14 was not purposeful racial discrimination—was not clearly erroneous. See *State v. James*, No. 2014AP2230, unpublished slip op. ¶2 (WI App Aug. 25, 2015).

¶10 Subsequently, in 2016, James filed a *pro se* motion for postconviction relief under WIS. STAT. § 974.06. In that motion, he claimed that his trial counsel had rendered ineffective assistance of counsel by: (1) failing to move for dismissal on grounds of insufficiency of the evidence; (2) failing to move for suppression of an out-of-court identification made by Charles Hierrezuelo, a witness for the State, as well as failing to call the police officer involved in that identification to impeach the officer's character; (3) failing to introduce into evidence an improper coercive statement allegedly made to James by police during their investigation; (4) failing to investigate and present alibi witnesses; (5) failing to challenge cell phone evidence; (6) failing to challenge

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³ James's trial and sentencing was before the Honorable Timothy G. Dugan, and we refer to this court as the "trial court."

ballistics evidence; and (7) failing to object to alleged juror bias. James also claims that his appellate counsel was ineffective because he did not raise these claims in James’s direct appeal.

¶11 The postconviction court⁴ denied James’s motion without a hearing. It concluded that James’s claims of ineffective assistance by his trial counsel all failed on the merits. It further found that James had failed to demonstrate that these claims were “clearly stronger” than the *Batson* claim that his appellate counsel had pursued in his direct appeal, in accordance with the standard set forth in *State v. Starks*, 2013 WI 69, ¶56, 349 Wis. 2d 274, 833 N.W.2d 146, which we discuss further below. This appeal follows.

DISCUSSION

A. Standard of Review

¶12 James did not bring any claims of ineffective assistance of counsel in his direct appeal. Absent a sufficient reason, a defendant may not bring a claim under WIS. STAT. § 974.06 if that claim could have been raised in a prior motion or direct appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of appellate counsel, however, may constitute a sufficient reason for not raising a claim in an earlier proceeding. *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.

¶13 Indeed, a claim of ineffective assistance of trial counsel must be preserved by a postconviction motion. *State ex rel. Rothering v. McCaughtry*,

⁴ James’s postconviction motion was before the Honorable Ellen R. Brostrom, and we refer to this court as the “postconviction court.”

205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). In order to secure a hearing on a WIS. STAT. § 974.06 motion, a defendant must allege sufficient material facts (i.e. who, what, where, when, why, and how) that, if true, would show that the defendant was entitled to relief. **Romero-Georgana**, 360 Wis. 2d 522, ¶30; **State v. Allen**, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Conversely, when a postconviction motion contains insufficient allegations or is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. **Romero-Georgana**, 360 Wis. 2d 522, ¶30. Whether the motion alleges sufficient facts is a question of law that we review *de novo*. See **Allen**, 274 Wis. 2d 568, ¶9.

¶14 Moreover, in order for allegations in a postconviction motion to be deemed sufficient, a defendant must do more than simply identify an issue of arguable merit that trial counsel did not raise. **Id.**, ¶¶21-22. Rather, pursuant to the “sufficient reason” standard, it is incumbent upon James to provide information that would undermine our confidence in the postconviction court’s denial of his motion by identifying a potential issue of merit for review. See **Escalona-Naranjo**, 185 Wis. 2d at 185.

¶15 There is a presumption that trial counsel is effective unless the defendant can prove otherwise. **State v. Balliette**, 2011 WI 79, ¶27, 336 Wis. 2d 358, 805 N.W.2d 334. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both that counsel’s performance was deficient and that the deficiency prejudiced his defense. **Strickland v. Washington**, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel’s actions or omissions were “professionally unreasonable.” **Id.** at 691. To demonstrate prejudice, “[t]he defendant must show that there is a reasonable

probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

¶16 Additionally, to establish a claim of ineffective assistance of appellate counsel, a defendant not only must prove the two prongs of the *Strickland* test, but also “must ... establish why the unraised claims of ineffective assistance of trial counsel were ‘clearly stronger’ than the claims that appellate counsel raised on appeal.” *Starks*, 349 Wis. 2d 274, ¶56. This entails showing that the claims not raised were “obvious and very strong, and that the failure to raise them cannot be explained or justified.” *Balliette*, 336 Wis. 2d 358, ¶69. Thus, the clearly stronger standard achieves the objective of maintaining “respect [for] the professional judgment of postconviction attorneys” in distinguishing meritorious claims from those that are frivolous “while at the same time ensuring that a defendant whose appellate attorney did not raise meritorious issues may still seek habeas relief.” *Starks*, 349 Wis. 2d 274, ¶60. The presumption of the effectiveness of counsel recognized for trial counsel is applicable to postconviction and appellate counsel as well. *Balliette*, 336 Wis. 2d 358, ¶28.

¶17 Whether counsel’s performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two *Strickland* prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. See *Strickland*, 466 U.S. at 697.

B. Ineffective Assistance Claims Alleged in Postconviction Motion and on Appeal

¶18 The postconviction court found that James failed to show that the claims of his postconviction motion were clearly stronger than those brought by appellate counsel in his direct appeal. *See Starks*, 349 Wis. 2d 274, ¶56. Furthermore, the postconviction court rejected all of James’s claims of ineffective assistance on the part of his trial counsel, and thus found that James failed to satisfy the prejudice prong of the *Strickland* test with regard to his claim against his appellate counsel. We have reviewed James’s postconviction motion and all of his claims of ineffective assistance, which are reiterated in this appeal. We agree with the postconviction court.

1. Sufficiency of the Evidence

¶19 James first argues that his trial counsel was ineffective for failing to move for dismissal on grounds of insufficiency of the evidence. The issue of the sufficiency of the evidence is a question of law that we review *de novo*. *See State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In making our determination, “we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence ‘is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.’” *Id.* (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Accordingly, we will “uphold the conviction if there is any reasonable hypothesis that supports it.” *Smith*, 342 Wis. 2d 710, ¶24.

¶20 The postconviction court noted that the State presented substantial evidence against James. For example, an eye-witness to the shooting at S.P.’s home stated the shooter had gotten into a brown sports utility vehicle; James was

captured on hospital surveillance video picking up his brother after that shooting in a burgundy Jeep that was similar to that description. Stotts, the passenger in Williams's car, identified Williams's shooter as Erosa, James's brother. Additionally, Smith, another witness to Williams's shooting, also saw a similar vehicle parked at that scene. Smith saw a black man in the driver's seat speak to another black man outside of the vehicle shortly before the Williams's shooting; Smith believed the man outside of the vehicle was the shooter.

¶21 Furthermore, when police recovered the burgundy Jeep from James's mother's residence three days after the shootings, they found an unfired 9mm cartridge that matched the spent shell casings found at the scene of Williams's murder. Moreover, police discovered that the Jeep was registered to Maxine Johnson, who later testified that she had loaned the vehicle to James.

¶22 The police also recovered from the Jeep a bill for the cell phone number belonging to James. At trial, the State then presented cell tower evidence that tracked tower usage of James's cell phone on the day of the shootings; it was used in the vicinity of both S.P.'s house and Williams's vehicle around the times of those respective shootings.

¶23 The postconviction court found that the totality of this evidence was sufficient to support reasonable inferences made by the jury that James was a party to both of these shooting incidents. We agree. Therefore, James's trial counsel was not deficient for failing to move for dismissal on grounds of insufficient evidence, because "[a]n attorney does not perform deficiently by failing to make a losing argument." *State v. Jacobsen*, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365. Furthermore, because James failed to satisfy the deficiency prong of

the *Strickland* analysis, we need not address the prong relating to prejudice. *See Strickland*, 466 U.S at 697.

2. *Out-of-Court Identification*

¶24 James next argues that his trial counsel was ineffective for failing to move for suppression of an out-of-court identification made by Charles Hierrezuelo, a witness for the State. James also contends that the police officer involved in that identification was dishonest, and that his trial counsel should have called the officer as a witness in order to impeach his character.

¶25 In the out-of-court identification, Hierrezuelo had identified James as possibly being the shooter at S.P.’s residence. However, Hierrezuelo testified at James’s trial that James was not the shooter at S.P.’s home. As this was favorable testimony for James’s case, the postconviction court “fail[ed] to perceive” how trial counsel’s failure to move to suppress this testimony could have prejudiced James. Furthermore, the court found that James’s reasons for having wanted to call the police officer involved in the identification by Hierrezuelo were irrelevant to the issues before the jury.

¶26 We agree with the postconviction court that James was not prejudiced by his trial counsel’s lack of action with regard to these issues. Therefore, James has failed to demonstrate ineffective assistance for this claim. *See Strickland*, 466 U.S at 697.

3. *Coercive Statement by Police*

¶27 James also argues that his trial counsel should have introduced evidence of statements to James made by police during the investigation. Specifically, James asserts that the police used improper, coercive tactics on him

during a police interview: he claims that one of the officers said something to the effect that they knew that James had not committed the shootings, but if James did not tell them who the actual perpetrator was, they would pin the crimes on him. James fails to name the officer who made this statement or the date and time of the interview, nor does he name a potential witness who could have been called to testify to these allegations.

¶28 Thus, the postconviction court found that James did not allege sufficient facts that, if true, would show that James was entitled to relief for this claim of ineffective assistance which would entitle him to a hearing on this claim. *See Romero-Georgana*, 360 Wis. 2d 522, ¶30. *See also Allen*, 274 Wis. 2d 568, ¶23. Furthermore, James does not explain how trial counsel's failure to attempt to introduce this evidence was prejudicial to his case. *See Strickland*, 466 U.S. at 697. We therefore uphold the postconviction court's denial of this claim without a hearing.

4. *Alibi Witnesses*

¶29 Next, James asserts that his trial counsel should have called two alibi witnesses. The first witness, Sherman Williams, states via affidavit that he was actually the owner of the cell phone that James had claimed was his, and that it was in Sherman's possession, not James's, on the day of the shootings. Clearly, this affidavit is intended to refute the cell tower evidence admitted at trial reflecting James's movements on the day of the shootings.

¶30 The second witness, DeAndre Johnson, also submitted an affidavit stating that he was with James at the time of Williams's shooting. He further stated that he is the son of Maxine Johnson, who owns the burgundy Jeep, and that he, not James, regularly used the Jeep during February 2012.

¶31 The postconviction court found that neither of the affidavits allege sufficient material facts to assess James's claim. The first affidavit by the purported owner of the cell phone was conclusory and did not include any supporting documentation, such as a bill in the affiant's name. Furthermore, it raises the question of why a receipt for a bill relating to the cell phone in question was found in the burgundy Jeep when police searched the vehicle after recovering it from James. Additionally, the postconviction court noted that the first affidavit did not even sufficiently confirm the identity of the affiant.

¶32 The second affidavit provides no basis of the requisite personal knowledge for the statements relating to possession of the burgundy Jeep at the time of both shootings. It also is contradictory to the hospital surveillance video showing James driving the burgundy Jeep shortly before Williams was shot, as well as Johnson's mother's testimony that she had lent the Jeep to James.

¶33 In sum, the postconviction court concluded that James's claim of ineffective assistance pertaining to these two witnesses lacked sufficient material facts that, if true, would show that James was entitled to relief, thereby entitling him to a hearing on this claim. *See Romero-Georgana*, 360 Wis. 2d 522, ¶30. *See also Allen*, 274 Wis. 2d 568, ¶23. We agree, and therefore uphold the postconviction court's denial of this claim without a hearing.

5. *Cell Tower Evidence*

¶34 James's next claim is that his trial counsel was deficient for failing to challenge the cell phone evidence admitted at trial. For the admission of this evidence, a police officer trained as a technical investigator, whose primary assignment is analyzing cell phone records, testified as an expert. In his claim, James argues that the officer is not an expert, but fails to explain this contention or

refute the experience of the officer that was described prior to the officer's testimony during the trial.

¶35 Again, the postconviction court found James's arguments to be conclusory and thus insufficient to warrant a hearing on James's claim of ineffective assistance relating to this issue. See *Romero-Georgana*, 360 Wis. 2d 522, ¶30. See also *Allen*, 274 Wis. 2d 568, ¶23. We agree and uphold the postconviction court's denial of this claim without a hearing as well.

6. *Ballistics Evidence*

¶36 James also argues that his trial counsel was deficient in not challenging the ballistics evidence presented at trial. Specifically, James contends that the evidence relating to the 9mm cartridge found in the burgundy Jeep should not have been admitted because it could have been placed in that vehicle at any time. This argument ignores the fact that the cartridge was found in a vehicle suspected of being used in a homicide three days after that homicide had occurred, and that it matched the casings that had been ejected from the gun used in that homicide.

¶37 James further asserts that his trial counsel should have hired a ballistics expert to refute this evidence. However, James does not establish that another ballistics expert would have testified favorably for the defense; therefore, he has not shown that he was prejudiced by this lack of action on the part of his trial counsel. Accordingly, James has failed to demonstrate ineffective assistance for this claim. See *Strickland*, 466 U.S. at 697.

7. *Juror Bias*

¶38 James's final claim of ineffective assistance by his trial counsel is that counsel failed to properly challenge the issue of juror bias. This is essentially the same argument presented by appellate counsel in James's direct appeal, although James expands the argument to include three other African-American jurors who were stricken by the State.

¶39 "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Moreover, James's argument on this issue is wholly undeveloped, and we decline to develop it for him. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). We therefore uphold the postconviction court's denial of this claim without a hearing.

¶40 In sum, we find that all of James's claims of ineffective assistance of trial counsel fail. Without a successful argument in that respect, James is unable to demonstrate that his appellate counsel was ineffective. *See Starks*, 349 Wis. 2d 274, ¶56.

¶41 Additionally, James failed to overcome the additional burden of proving that these ineffective assistance claims are clearly stronger than the *Baston* challenge made on direct appeal through his appellate counsel. *See Starks*, 349 Wis. 2d 274, ¶56. Indeed, James does not make a cogent argument in this regard, instead making only conclusory statements that he has met this burden; he has not. Accordingly, we affirm the order of the postconviction court denying James's postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT.
RULE 809.23(1)(b)5.

